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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 468

EMMETT COCHRAN, ET AL.,
Appellants,

versus

LOUISIANA STATE BOARD OF EDUCATION, ET ALS.,
Appellees.

Motion of Appellees to Dismiss for Want of Jurisdiction.

PERCY SAINT,
Attorney General;

PEYTON R. SANDOZ,
Assistant Attorney General.

H. H. WHITE,
WALTER J. BURKE,
R. F. WHITE,
WHITE, HOLLOMAN & WHITE,
BURKE & SMITH,
Of Counsel.

MONTGOMERY-ANDREE PRINTING CO. INC., 430-432 CHARTRES, N.O.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

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versus

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Appellees.

Motion of Appellees to Dismiss for Want of Jurisdiction.

Comes now the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be dismissed.

PERCY SAINT,
Attorney General;
PEYTON R. SANDOZ,
Assistant Attorney General.

H. H. WHITE,
WALTER J. BURKE,
R. F. WHITE,
WHITE, HOLLOMAN & WHITE,
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Counsel for Appellees.

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EMMETT COCHRAN, ET AL.,

Appellants,

versus

LOUISIANA STATE BOARD OF EDUCATION, ET ALS.,

Appellees.

Statement in Support of Motion to Dismiss for Want of Jurisdiction.

SYLLABUS OF POINTS.

(1)

The question whether or not State Statutes conflict with the Constitution of the State is settled by the decisions of its highest Court.

(2)

The statutes in question are valid because the State has power to tax for the purposes for which the tax is levied.

(3)

The tax in question is not levied for a private but for a public purpose, viz., to promote the education of the

children of the State, without distinction as to race, color, creed, sect or denomination.

(4)

The furnishing of free textbooks is in aid of the cause of education generally—a laudable public purpose, and not in aid of private or sectarian schools or individuals.

(5)

The public has a common and equal benefit flowing from the use of free textbooks, and *quo ad* their use the public authorities of the State have control, whether the books are used by pupils of the public or private schools.

(6)

Education is one of the purposes for which the police power of the State may be exercised.

(7)

Judicial interference with State tax legislation, or with appropriations of public funds by State legislatures, cannot be justified unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated.

(8)

The decision of the State Court could have been made under rules of general jurisprudence broad enough, in themselves, to sustain the judgment without consideration of the federal question sought to be injected.

(9)

The appellants attack the legality of a specific appropriation made by the Legislature of Louisiana for the purchase of free textbooks for the use of the school children of the State. Whether or not such an appropriation

should be made is a legislative question over which the courts have no supervision or control.

A citizen cannot enjoin or otherwise contest appropriations made by the Legislature when affected in the same manner as the mass of citizens.

(10)

Where a citizen is accorded a right of action by the State Supreme Court to contest the constitutionality of a State law making an appropriation for the purchase of books for free distribution among all educable children of the State, and the law has been declared by the State Supreme Court to be constitutional, on appeal to the United States Supreme Court upon the alleged violation of Section 4 of Article IV of the Federal Constitution, and under the due process clause of the Fourteenth Amendment to the said Constitution, such citizen should show some right recognized as justiceable by the United States Supreme Court before jurisdiction will be entertained.

AUTHORITIES.

(1)

The question whether or not State Statutes conflict with the Constitution of the State is settled by the decisions of its highest Court.

"The question whether or not a state statute conflicts with the Constitution of the State is settled by the decision of its highest Court."

Carstairs v. Cochran (Md. 1904), 24 S. Ct. 318; 193 U. S. 10, 16; 48 L. Ed. 596.

"Whether or not a state court exceeded its functions under the State Constitution cannot give

rise to a question respecting due process of law which will sustain the appellate jurisdiction of the federal Supreme Court."

Burt v. Smith (N. Y. 1906), 203 U. S. 129, 27 S. Ct. 37, 51 Law Ed. 121.

"The Supreme Court of the United States has no jurisdiction to determine that any law of any State legislature, contrary to the Constitution of such State, is void."

Calder v. Bull, 3 Dall. 392.

Colorado Power Co. v. Halderman, 295 Fed. 178.

(2)

The Statutes in question are valid because the State has power to tax for the purposes for which the tax is levied.

"Education is one of the purposes for which public funds raised by taxation may be expended."

26 R. C. L., pp. 48, 49, Sec. 32.

37 Cyc., pp. 720, 721, Sec. 2.

(3)

The tax in question is not levied for a private, but for a public purpose.

Cases cited by appellants distinguished.

Parkersburg v. Brown, 106 U. S. 487, 501.

Cole v. LaGrange, 113 U. S. 1, 6.

Fall Brook Irrigation Dist. v. Bradley, 164 U. S. 112, 158.

Savings & Loan Assn. v. Topeka, 20 Wall. 655.

The above cases cited from State Courts, viz., *Underwood v. Wood, 93 Ky. 177; Smith v. Donahue, 195 N. Y. S. 715*, etc., do not apply because they simply interpret the statutes and the constitutions of the respective states in which they were rendered.

In Louisiana, the highest Court of the State has held, in three cases, that statutes providing for free school books are not invalid as lending or granting state funds derived from taxation to private or sectarian purposes.

Borden v. La. State Board of Education, 168 La. 1005; 123 So. 655.

Cochran v. La. State Board of Education, 168 La. 1030; 123 So. 664.

Bossier Parish v. La. State Board of Education, 168 La. 1033; 123 So. 665.

"A tax levied by the legislature is for a public purpose, so as to render it constitutional, where it is for the support of government, or for any of the recognized objects of government, or if the proceeds will directly promote the welfare of the community in equal measure."

Beach v. Bradstreet, 82 Atl. 1030, 1032; 85 Conn. 334; Ann. Cas. 1913B, 946.

"The purposes for which taxes may be levied are denominated public purposes, not in the broad general sense, but in the constitutional sense of such statewide purposes as are contemplated by the functions of government under the system created by the fundamental law."

State v. Donald, 151 N. W. 331, 364; 160 Wis. 21.

"The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable the United States Supreme Court to revise the decisions of the State courts upon questions of State law."

Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157.
McCaughey v. Lyall, 224 U. S. 558.
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.

(4)

The furnishing of free textbooks to the school children of the State accrues to the benefit of all of the children of the State, and is not in aid of private or sectarian schools or individuals.

Pierce v. Society of Sisters, 268 U. S. 529; 69 Law Ed. 1070; 39 A. L. R. 468, note at p. 477.

"Be it enacted by the Legislature of Louisiana, That the Severance Tax Fund of the State, as levied by Act 140 of 1922, as amended, shall be devoted after allowing funds and appropriations as provided by the Constitution of the State, first, to supplying school books to the school children of the State of Louisiana, and that thereafter such further sums as remain in the said Severance Tax Fund shall be transferred to the State public school funds."

Sec. 1, Act 100 of 1928, Legislature of Louisiana.

"For purchase of free school books for the use of school children of this State, to be expended by the State Board of Education of Louisiana as provided by House Bill No. 90 of 1928, or so much thereof as may be necessary.....$750,000.00

(After the above appropriations have been paid or provided for, then the balance from said Severance Tax Fund to be transferred to the current school fund as provided by House Bill No. 90 of 1928)." *(Act 143 of 1928, Legislature of Louisiana, p. 188).*

If the acts had provided free textbooks for other than **all the school children of the State,** for example, only those who attended public schools, they might have been violative of the equality and uniformity clauses of the Constitution of the State and of the United States.

(5)

The public has a common and equal benefit flowing from the use of free textbooks and *quo ad* their use the public authorities of the State have control, whether the books are used by pupils of public or of private schools.

"That the State Board of Education of Louisiana shall provide the said school books for school children, free of cost, to such children out of said tax fund, and thereafter apply the remaining sums out of the said Severance Tax Fund to the State public school funds."

Sec. 2, Act No. 100, of the Legislature of Louisiana of 1928, p. 114.

"To invoke the judicial power to disregard a statute as unconstitutional, the party who assails it must show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Massachusetts v. Mellon, 262 U. S. 447.
Morgan v. Graham, 1 Woods, 124.

"A party has no interest to assert that a statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of a constitutional right."

Costillo v. McConnico, 168 U. S. 680.

Straus v. Foxworth, 231 U. S. 162.

New Orleans v. N. O. Waterworks Co., 142 U. S. 88.

"The equal protection of the laws is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

Duncan v. Missouri, 152 U. S. 382.

Atchison Railroad v. Matthews, 174 U. S. 104.

McPherson v. Blacker, 146 U. S. 39.

(6)

Education is one of the purposes for which the police power of the State may be exercised.

"The police power of states extends to the protection of lives, limbs, health, comfort, morals, and quiet of society."

Barbier v. Connolly, 113 U. S. 31; 28 L. Ed. 923.

Slaughter House Cases, 83 U. S. 36, 130; 21 L. Ed. 394.

"The power of the states to establish and maintain systems of common schools, to raise money for that purpose by taxation, and to govern, control, and regulate such schools when established is one of the powers not delegated to the United States

by the Constitution, nor prohibited by it to the states, and is reserved to the states respectively or to the people. * * * ."

35 Cyc., p. 817.

"Under this amendment the Supreme Court cannot supervise State legislation in the exercise of the police power beyond protesting against laws of an ordinary character having no reasonable relation to the execution of lawful purposes."

Jones v. Portland, 245 U. S. 217.

"An objection that a State statute denies to a party the equal protection of the law can only be sustained if the statutes treat the party differently from what it does others who are in the same situation as he; that is, in the same relation to the purposes of the statute."

Lloyd v. Dollison, 194 U. S. 445.
International Harvester Co. v. Missouri, 234 U. S. 199.
Gulf Railroad v. Ellis, 165 U. S. 150.
Halter v. Nebraska, 205 U. S. 34.

"Neither this amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and all of its wealth and prosperity."

Barbier v. Connolly, 113 U. S. 31.
Holden v. Hardy, 169 U. S. 366.
Dent v. West Virginia, 129 U. S. 114.
Mulger v. Kansas, 123 U. S. 623.
Munn v. Illinois, 94 U. S. 113.
Budd v. New York, 143 U. S. 517.
Smyth v. Ames, 169 U. S. 466.

(7)

Judicial interference with State tax legislation cannot be justified unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated.

"Judicial interference with state tax legislation, the purpose of which has been declared by the people of the State, the legislature, and the highest State court to be of a public nature and within the taxing power of the State, cannot be justified unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated."

Green v. Frazier, 235 U. S. 233; 64 L. ed. 878.

(For other cases, see Courts I, e, 3, C, in Digest Sup. Ct. 1908).

"Whenever a state law imposes a tax, assessment, servitude or other burden upon property for the public use, either of the whole state or a limited portion thereof, and such law provides a mode of confirming or contesting such a charge in the ordinary courts of justice, with due notice to the owner, the judgment in such proceedings does not deprive the owner of his property without due process of law."

Fallbrook Irrigation Dist. v. Bradley, 164 U. S. Ill, and Syl.

"* * *. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the XIVth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under

consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law."

Davidson v. Board of Administrators of New Orleans, 96 U. S. 96-108; 24 L. ed. (1. c.) 619.

"The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable the United States Supreme Court to revise the decisions of the State courts upon questions of State laws."

Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157;

McCaughey v. Lyall, 224 U. S. 558;

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.

"However great the hardships or unequal the burden, it can not be said that a tax collected for a public purpose is taking the property of the taxpayer without due process."

Kelly v. Pittsburgh, 104 U. S. 82.

Henderson Bridge Co. v. Henderson, 107 U. S. 614.

Green v. Frazier, 235 U. S. 233.

Knight v. Jackson, 260 U. S. 12.

(8)

The decision of the State Court could have been made under rules of general jurisprudence broad enough, in themselves, to sustain the judgment without consideration of the federal question sought to be injected.

Adams v. Russell, 229 U. S. 353; 57 L. ed. 1224.
Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683.

The analogy sought to be drawn by appellants between the case at bar and cases of eminent domain is favorable to appellees.

> "The construction placed by the Supreme Court of a state upon statutes of the state authorizing the condemnation, under the power of eminent domain, of places of unusual historical interest, and its holding that their meaning is clear as applied to proceedings to acquire title to an Indian mission, are binding on the Supreme Court of the United States."
>
> *Katherine C. Roe v. State of Kansas, etc., U. S. S. C. adv. Rp., January 15, 1929, No. 5, p. 166.*

(9)

The appellants attack the legality of a specific appropriation made by the Legislature of Louisiana for the purchase of free text-books for the use of the school children of the State. Whether or not such an appropriation should be made is a legislative question over which the courts have no supervision or control.

A citizen cannot enjoin or otherwise contest appropriations made by the Legislature when affected in the same manner as the mass of citizens.

> "Whether an appropriation shall or shall not be made is a legislative question, and over purely

legislative questions the courts have no supervision or control. A question of that character is beyond the touch of the judiciary, for one department of government cannot enter the domain of another."

Smith v. Meyers, 109 Ind. 1.
State v. Haworth, 122 Ind. 462, 7 L. R. A. 240.
Wilson v. Jenkins, 72 N. E. 6.
Burch v. Earhart, 7 Cal. 59.
Franklin v. Board, 23 Cal. 173.
People v. Pacheco, 27 Cal. 175.
Carr v. Indiana, 11 L. R. A. 370.

(10)

Where a citizen is accorded a right of action by the State Supreme Court to contest the constitutionality of a State law making an appropriation for the purchase of books for free distribution among all educable children of the State, and the law has been declared by the State Supreme Court to be constitutional, on appeal to the United States Supreme Court upon the alleged violation of Section 4 of Article IV of the Federal Constitution, and under the due process clause of the Fourteenth Amendment to the said Constitution, such citizen should show some right recognized as justiceable by the United States Supreme Court before jurisdiction will be entertained.

A citizen of the United States attacked an appropriation of Congress on the ground that the appropriation would increase the future taxation and thereby take her property without due process of law, the interest of the taxpayer in the funds belonging to the government was held to be so minute

and the effect on the individual taxpayer so remote as not to present any basis for an appeal to courts. *Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597; 67 L. ed. 1078.*

The conclusion of the Court in that case is stated in the following language:

"If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect to every other appropriation act and statute whose administration requires the outlay of public money, whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained." *Id.*

We submit that this Court has no jurisdiction under Section 237 of the Judicial Code, as amended, or any other law, and respectfully pray that this cause be dismissed as in case of lack of jurisdiction.

Respectfully submitted,

PERCY SAINT,
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